IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 233 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and Sd/-
MR.JUSTICE M.C.PATEL Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

No.1 Yes. Nos. 2 to 5 No

COMMISSIONER OF INCOME-TAX

Versus

PANKAJKUMAR R SHAH

Appearance:

MR MANISH R BHATT for Petitioner

SERVED BY RPAD - (N) for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL and
MR.JUSTICE M.C.PATEL

Date of decision: 24/07/1999

ORAL JUDGEMENT

The Commissioner of Income tax (Gujarat III), Ahmedabad has filed this application seeking answer on the following two questions :

[1]"Whether on the facts and in the circumstances

of the case, the Tribunal was right in law in coming to the conclusion that the reopening of assessment u/s.147(b) of the Act was not valid ?"

[2]"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the exparte assessment order passed by the ITO was not legal and valid ?"

From the record it transpires that for the assessment year 1975-76, Assessing Officer assessing the income of the assessee under Section 143(1) of the Income tax Act 1961 (hereinafter referred to as the 'Act'), by an order dated 15.11.1976 determined total income of the assessee at Rs.4,660/-. On or about 23.12.1978, notice under Section 148 of the Act was issued, which was served on the assessee on 3.1.1979. The Assessing Officer by order dated 31.3.1980, determined the total income of Rs.91,844/-. It appears that the Assessing Officer was of the view that the income earned by the assessee by way of capital gain has escaped the assessment. He was of the view that transfer of 700 shares of Arvind Mills as stock in trade to the partnership firm styled as M/s.Shah Traders in which the assessee was a partner would amount to transfer of shares and would attract the provisions of the Act. The Assessing Officer considering the market rate, cost of acquisition and permissible deduction held that the assessee was required to pay tax of capital gain of Rs.87,140/-. The aforesaid order was challenged before the Assistant Appellate Commissioner who allowed the Appeal preferred by the assessee. The revenue carried the matter before the Tribunal contending that the Assistant Appellate Commissioner was not justified in holding that initiation of proceedings under Section 147 were ab initio void.

It is required to be noted that the assessee in his return disclosed the transaction in statement of income attached with the return. Thus, there was disclosure of the fact that the shares of Arvind Mills were introduced in the name of M/s.Shah Traders towards his share capital. It was pointed out before the Tribunal that the matter was discussed with the Assessing Officer and the assessment was made on the basis of full disclosure of facts made by the assessee. It was pointed out to the Appellate Authority that there was no fresh information or new material which could be said to have

come into possession of the Assessing Officer justifying reopening of the assessment under the provisions of Section 147(b) of the Act.

The audit party drew the attention of the Assessing Officer to the fact that the transfer of shares of Arvind Mills by the assessee would amount to relinquishing the right over the property and that would amount to transfer within the meaning of Section 247 of the Act. Thus, the audit party merely invited ITO's attention to the legal position and had not expressed any legal opinion. It may be stated at this stage that the facts were stated in the return. Taking into consideration the binding instructions of the Commissioner, the audit party pointed out to the Assessing Officer the nature of instructions. However, the same would not amount to information from external source and would not confer any jurisdiction on the Assessing Officer to reopen the assessment which was already closed. Existing instructions were brought to the notice of the ITO would not constitute information as to the facts which would be permissible in accordance with the principles laid down by the Apex Court to reopen the assessment. It is clear from the facts that the Assessing officer has not traced any fresh information which would enable him to reopen the assessment. The audit party was not competent to pronounce the judgment on the legal implication of the transaction. The audit party was not clothed with the jurisdiction to pronounce the judgment and as the facts were very much before the ITO, it cannot be said that new facts were enearthed by the Assessing Officer. Section 147(b) of the Act would authorise the Assessing Officer to reopen the assessment. Section 147(a) and (b) as applicable reads as under :

"147. If -

(a) the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under Section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his

possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of Sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned ...."

From the facts, it cannot be said that the assessee failed to disclose fully and truly all material facts necessary for assessment for that year and that the Income-tax Officer in consequence of information in his possession had reason to believe that income chargeable has escaped the assessment. The Apex Court in the case of Indian and Eastern Newspaper Society Vs. Commissioner of Income-tax, New Delhi, reported in (1979) 119 ITR 996 pointed out what is information. The material was already with the Assessing Officer. The Apex Court in case of Eastern Newspaper Society (Supra) held that -" The opinion of the audit party on a point of law could not be regarded as "information" enabling the ITO to initiate reassessment proceedings under s.147(b). The ITO had, when he made the original assessment, considered the provisions of ss. 9 and 10 of the Indian I.T.Act,1922. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him." Thus, the material which was already before him, the Assessing Officer passed an assessment order. In our opinion, the Tribunal has rightly rejected the Appeal preferred by the revenue.

In view of what is stated herein above, we answer the question in affirmative, against the revenue and in favour of the assessee. Rule discharged with no order as to cost.

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m.m.bhatt